UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-2418, 01-2857

HUCK STORE FIXTURE COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

The jurisdictional statement of Huck Store Fixture Company ("the Company") is correct, but incomplete. This case is before the Court upon the petition of the Company to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's order that issued against the Company on May 29, 2001. The Board issued a corrected Decision and Order on July 13,

2001. The Board's Decision and Order are reported at 334 NLRB No. 20. (SA 2-15.)[1]

The Board had jurisdiction over this proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Quincy, Illinois. The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on June 6, 2001. The Board filed its cross-application for enforcement on July 16, 2001. The Company's petition and the Board's cross-application were timely under the Act, which does not impose time limitations on those actions.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary affirmance of its uncontested findings that the Company violated Section 8(a)(1) of the Act by engaging in

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[1] The short appendix in the back of the Company's brief consists of the Board's May 29, 2001 Decision and Order rather than the Board's July 13, 2001 corrected decision and order. The corrected decision and order is attached at the end of the Board's brief as a Supplemental Appendix. "SA" references are to that supplemental appendix. "Tr" references are to the transcript of the hearing before the administrative law judge. "GCX" and "RX" references are to the exhibits introduced by the General Counsel and the Company, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br" references are to the Company's brief.

unlawful interrogations, surveillance, threats, and other coercive statements and actions in response to its employees' union activities.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by laying off and discharging 33 employees because of union activities; by hiring 10 Snelling employees on a permanent basis in order to discharge or lay off union supporters; by granting wage increases in order to discourage union activities; and by conducting new employee evaluations, and using the evaluations to target union supporters for layoff and discharge.

3. Whether the remedial action ordered by the Board for Snelling's employees was reasonably within the Board's broad discretion.

STATEMENT OF THE CASE

This case came before the Board on a complaint issued by the Board's General Counsel, following investigation of a charge filed by Mid-Central Illinois District Council of Carpenters affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("the Union"). After conducting a hearing, an administrative law judge issued a decision and recommended order, finding that the Company had committed numerous violations of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) and Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). The Company and the General Counsel filed exceptions to the

administrative law judge's decision. On May 29, 2001, the Board issued its Decision and Order, affirming the administrative law judge's rulings, findings, and conclusions, as modified, and adopting his recommended order, as modified. (SA 1-9.) The Board further found that the Company committed certain additional violations of Section 8(a)(3) and (1) of the Act. (SA 4-5.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company is engaged in the manufacture and nonretail sale of store display fixtures and related products at its Quincy, Illinois facility. (SA 109; GCX 1(d), p. 2, GCX 1(f), p. 1.) Company President Gene Prock purchased the Company from K-Mart Corporation and began operations in November 1995. (SA 10; Tr 982-983.) Under K-Mart's ownership, the facility's production and maintenance employees were represented by the Union. (SA 10; Tr 1311.)

In January 1996, the Company entered into an agreement with Snelling Personnel Services ("Snelling") to provide the Company with temporary employees. The agreement included a proviso that allowed the Company to hire a Snelling employee on a permanent basis after he or she had worked for the Company for more than 300 hours. (SA 10; Tr 839-841.) Snelling referred employees to work at the Company in January and April 1996, and thereafter.

(SA 10; Tr 842-843.) The Company also hired employees directly in 1996 and 1997, reaching a complement of approximately 200 production and maintenance employees. (SA 10; Tr 709.) In December 1996, the Company hired a number of Snelling employees who had worked for the Company for more than 300 hours. (SA 10; Tr 712-713.)

In mid-January 1997, Prock called a meeting of the employees, including supervisors. He informed the employees that the business outlook for 1997 was good, and there was not much to worry about. He said that the business had built up quicker than he had anticipated, and mentioned new orders from customers. (SA 10, 11; Tr 116-117, 1001-1002.)

B. The Employees Initiate a Unionization Campaign; the Company's Response

In the meantime, on January 1, 1997, employee Wayne Steffen contacted the Union. (SA 10; Tr 38, 47-48.) Company employees attended union meetings on January 20 and 30. (SA 10; Tr 48-50.) During a third meeting on February 6, the attending employees signed union authorization cards and formed an organizing committee that included employees Steffen, Jay Schieferdecker, Roger Willis, Roger Stice, Owen Brown, Lenny Vandermaiden, and Richard Budde. Members of the organizing committee solicited signed cards from other employees. (SA 10-11; Tr 50-52, 350, 356.)

Around February 13, the Company learned about the organizing campaign and, on that date, Prock met with his supervisors. Prock asked the supervisors if the employees had revealed why they wanted a union. Some supervisors answered, saying that the employees were complaining that Prock was paying them low wages while he lived in an expensive house. (SA 6, 11; Tr 790-791, 890-893.)

Later that same day, President Prock assembled the employees. Prock jumped up on a workbench, and, while waving a union authorization card over his head, told the employees that the Company was aware of the organizing and strongly opposed it. Prock told the employees that they could ask for their authorization cards back and could tear them up. (SA 11; Tr 38, 53-55.)

The Company's managers and supervisors learned the identities of many union supporters. Supervisor James Winking learned from employees that in his department employees Richard Budde, Jerry Schieferdecker, Wayne Steffen, Roger Stice, and Roger Willis supported the Union. Winking passed that information to Production Coordinator Kent Smith. (SA 4 n.11; Tr 639-644.) Winking also discussed the identity of union supporters with Supervisors Jeffrey Gibbs, Ronald Mock, and Roger Trimpe. (SA 4 n.11; Tr 137, 154-155, 602, 687.) Smith observed Budde and Willis distributing union authorization cards. (SA 4 n.11; Tr 863, 910-911.) Smith was also aware of employees' views supporting or

opposing the Union because he was on the plant floor all day and heard employees' comments. (SA 4 n.11; 877-878.)

Company supervisors spoke to several employees about the Union. On February 13, following Prock's speech to the employees, Supervisor Trimpe approached 5 employees at their work stations and asked them what they thought about the Union. (SA 11; Tr 137, 148-150.) Trimpe also walked by employee Jeremy Fruit's work station and asked Fruit what he thought he could get from the Union. Fruit replied that he would expect higher wages. Trimpe answered Fruit, saying that Fruit might get a 10-cent raise, but would not be better off because he would have to pay union dues. (SA 11; Tr 387, 389-391.)

The next day, Supervisor Winking approached employee Jerry Schieferdecker at his workbench. During the ensuing conversation, Winking said that he was seriously interested in what the employees thought of the Union. Schieferdecker replied that it was time something was done about the employees' pay. Winking responded that if confronted with the Union, the Company would close the doors and leave. Ten or fifteen minutes later, Winking returned and asked if Schieferdecker had heard anything about actual organizing activities, adding that it was "just too early" for the employees to organize. (SA 11; Tr 350, 359-362.)

On February 17, Supervisor Mock approached Thomas Boone, an employee assigned to his department. Mock asked Boone whether he had attended the last union meeting; Boone replied that he had. Mock then asked how many people were present at the meeting; Boone replied six or seven. Mock continued, asking who was behind the organizing effort. Boone replied that Mock could go to a union meeting and find out. Mock then asked whether Richard Budde or Roger Willis were organizing the Union. Boone refused to answer. (SA 12; Tr 193, 212-214, 308, 314-315.) Two days later, on February 19, Supervisor Winking told employee Gallagher that Prock would move the plant elsewhere if the employees were to organize a union. (SA 12; Tr 554, 561-562.)

On February 20, 4 union representatives, including Business Representative Roger Schoenekase, distributed union literature at the Company's facility. The literature included information about a union meeting scheduled for February 22. Company Supervisor Jeffrey Gibbs approached the union representatives and was given a copy of the literature. (SA 11; Tr 1052, 1057-1060, 1062-1063, GCX 76.)

On February 21, Supervisor Trimpe spoke with employees Jason Mooneyham and Jeremy Fruit. Trimpe asked them if they were going to attend the next scheduled union meeting. Fruit said he did not know. Trimpe then told the two employees that they had better not go to the meeting because he would drive by and if he recognized their cars, he would fire them. Fruit replied that

Trimpe's threat sounded illegal. Trimpe said that Fruit could not be fired for his union activity, but could be fired for his performance on the job. (SA 12; Tr 337, 341-342, 387, 391-393.)

On February 22, the Union held a meeting at its union hall. Approximately 17 employees attended the meeting. Supervisors Jeffrey Gibbs and Steve Lockett went to the union hall and tried to gain admission to the meeting. They were refused admission because they were supervisors. At least one employee saw Gibbs and Gibbs saw two employees at the meeting. (SA 12; Tr 55-56, 958, 1169, 1177.)

On February 25, Supervisor Paul Lowe initiated a conversation with employee Richard Budde. He asked Budde, in a confrontational manner, why Budde was trying to organize for the Union. Budde asked Lowe what he was talking about. Lowe said that Budde "knew what in the hell [Lowe] was talking about," that Budde was "sneaking around under the table, trying to get cards signed," and that "if he was a real man, he would stand up and talk to everyone and not just one at a time." Lowe asked Budde if he felt guilty about the possibility that employees could lose their jobs for what he was doing. Lowe added that employees could lose their livelihood and their ability to support their families because of Budde. He told Budde that he should "get the hell out" and

quit before he "cost everybody their jobs." (SA 12; Tr 56-58, 936, 939-940, 1082, 1088-1090.)

C. The Company Assists in Circulating an Antiunion Petition as Supervisors Continue to Confront Employees About the Unionization Campaign

On February 26, employee Mark Smith approached Supervisor Trimpe with an antiunion petition. Trimpe told Smith that he would have to get Company Vice President Gene Soebbing's permission to circulate the petition. (SA 12; Tr 137, 156-157.) Later that day, Supervisor Trimpe signed the petition and passed it around to about 8 employees in his department. He urged the employees to sign the petition and threatened to discharge them if they refused. Subsequently, Trimpe handed the petition to Shipping Department Supervisor David Schnelbacker. (SA 12-13; Tr 158-159, 164, 337, 343, 387, 394-395, GCX 10.)

Later that same day, Supervisor Jeffrey Gibbs contacted Production Coordinator Kent Smith and informed him that the petition had disappeared. Gibbs and Smith informed Vice President Soebbing. Soebbing went to Supervisor Ronald Mock's department, where the petition was found by Supervisor Winking. Winking signed the petition in front of the employees and continued to "keep an eye on it" as it circulated through his department. (_____)

The petition disappeared again when employee James Gallaher placed it in his toolbox. Winking approached Gallaher and demanded that Gallaher produce

the petition. Gallaher said he did not have it. Winking paged Production Coordinator Smith and Vice President Soebbing on the intercom and they met Winking in his office to discussed the loss of the petition. (SA 4 n.11, SA 13; Tr 564-567, 636-657, 766-769, 863, 875-877, GCX 10.) Employee Mark Smith later prepared a second petition. Winking assisted in the circulation of that petition. He handed it to Supervisor Mock who signed the petition and then passed it around to the employees in his department. (SA 4 n.11, SA 13; Tr 217-218, 668-669, GCX 11.) On February 27, Smith took the second petition to Soebbing, who placed it on Prock's desk. (SA 4 n.11, SA 12; Tr 769-770, 1003.)

On February 26, Supervisor Winking approached employee Carl Steffen. Winking asked Steffen about the Union. Steffen said that he was interested in anyone who could help improve his pay and benefits. Winking recounted how he had lost a job with the predecessor company because of the Union, and that he would do whatever it took to keep his job. (SA 13; Tr 58-60.)

On February 28 or 29, Supervisor Trimpe spoke to employee Gallaher and two other employees. Trimpe looked at Gallaher and, in a loud voice, said, "What do you boys think about this union shit?" The employees did not respond. Trimpe then said, "I think we ought to take you boys out who signed union cards, and kick your asses." (SA 13; Tr 569-570.)

D. The Company Discharges and Lays off 33 Employees, Hires 10 Snelling Employees on a Permanent Basis and Grants Wage Increases

On February 20, the day union representatives distributed literature at the Company, President Prock and his service managers decided that the Company should undergo a significant reduction in the workforce through layoffs and discharges. To implement the decision, it was also decided that employees would undergo a new round of performance evaluations that differed from the performance evaluations done in November 1996. (_____). On March 4, the Company discharged 8 employees,[2] 5 of whom had signed union authorization cards.[3] It also discharged 3 Snelling employees.[4] On March 7, the Company discharged 7 more Snelling employees.[5] On March 11, the Company laid off 12

[2] Robert Booher, Jon Borenson, Leonard Brooks, Jeremy Fruit, William Fruit, Sam Hutton, John Jacobs, and Pierre Parrish (SA 2, 5, 14; Tr 756-757. GCX 55.)

[3] Brooks, Jeremy Fruit, William Fruit, Hutton and Parrish. (SA 5 and n.13; GCX 20, 23, 78, 79, 82.)

[4] Tom Killday, Tyson Mock, and Kevin McAfee. (SA 1, 5-6; GCX 55.)

[5] Quenten Brace, Dan Byington, James Cannon, Joe Chitwood, Kyle Daggett, Jack Doran, Greg Hultz, Crystal Jenkins, Wes Massengill, Daniel Werneth. (SA 2, 5, 14; GCX 55)

more of its own employees,[6] 10 of whom had signed authorization cards,[7] and 4 of whom were also members of the Union's 7-person organizing committee.[8] In the meantime, on March 10, the Company hired 10 of the Snellings employees as its own employees. (SA 5; Tr 760.)

As a screening tool for the discharges and layoffs, the Company devised an employee evaluation scheme that differed from the one the Company had applied 4 months earlier in November 1996. In November, the employees were told that the next evaluation would be in 6 months. (SA 4; Tr 572, 645-646.) In the new evaluations, supervisors gave a numerical score to the employee in each of 5 categories: attitude, absenteeism, work habits, quality of work, and knowledge. (SA 4; GCX 3.) To grade absenteeism (also referred to as attendance), the Company devised a new, more stringent scoring system than it had used previously. (SA 4; Tr 778-780, GCX 45.)

On March 17, the Company granted wage increases to the approximately 30 employees whose hourly rate was less than $8. Ten employees received an

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[6] Tom Boone, Owen Brown, Gary Chapman, James Ende, James Gallaher, Marty McGlauchen, James Payne, Jerry Shieferdecker, Brandon Schroeder, Wayne Steffan, Dennis Tarpein, and Roger Willis (SA 2, 5, 14; GCX 55.)

[7] Boone, Brown, Chapman, Gallaher, McClauchen, Payne, Schieferdecker, Steffen, Tarpein, and Willis. (SA 5 n.14; GCX 4, 15, 18, 19, 21, 31, 32, 81, 83, 84.)

[8] Brown, Schieferdecker, Steffan, and Willis (SA 5 n. 15, SA 10-11; Tr 350, 356.)

increase of $.50 and the others received an increase of $.25. The most recent wage increase of that size had been granted in November 1996. (SA 6; Tr 783, GCX 47.)

E. The Company's Rule on Literature Distribution

The Company's Employee Handbook provides in pertinent part that no person may distribute literature or post notices on company premises without written permission from management. The policy further provides that employees are subject to discipline, including discharge, for violations of the policy. (SA 13; RX 1, pp. 15-16, Tr. 771-772.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Hurtgen and Members Liebman and Truesdale) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating its employees about their union activities; engaging in surveillance of its employees' union activities and giving employees the impression that their union activities were under surveillance[9]; threatening its employees with plant closure, discharge, physical violence, and unspecified reprisals because of their union activities; telling an employee that he should find

[9] Chairman Hurtgen found it unnecessary to pass on the allegation that Supervisor Mock's questioning of employee Boone (SA 12) conveyed the impression of surveillance in addition to it constituting unlawful interrogation. (SA 2 n.3.)

another job if he wanted to engage in union activities; telling an employee that he must obtain company permission to engage in union activities; soliciting employees to sign an antiunion petition and unlawfully circulating and assisting in obtaining signatures on an antiunion petition; and by maintaining an overly broad solicitation policy prohibiting any solicitations and literature distribution on company property without prior company approval. (SA 2, 11-13, 15-16.)

The Board also found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by laying off or discharging 33 employees because of its employees' union activities and by granting wage increases to other employees in order to discourage union activities. (SA 2-4, 13-15.)

The Board, granting the General Counsel's exception, further found that the Company violated Section 8(a)(3) and (1) of the Act by hiring 10 Snelling employees on a permanent basis in order to discharge or lay off union supporters. (SA 1, 5.) The Board also granted the General Counsel's additional exception in concluding that the Company violated Section 8(a)(3) and (1) of the Act not only by conducting new employee evaluations to facilitate the unlawful lay offs and

discharges but, in addition, by using the evaluations to target union supporters for layoff or discharge. (SA 1, 4-5.)[10]

The Board's order requires the Company to cease and desist from engaging in the unfair labor practices found, and from any like or related manner interfering with, restraining or coercing its employees in the exercise of their statutory rights. (SA 2, 6-7, 16-17.) Affirmatively, the order requires the Company to offer reinstatement to and to make whole its employees who were unlawfully laid off; to make whole the 13 Snelling employees who were unlawfully discharged and to notify Snelling that it does not object to those 13 employees being referred to work at the Company's facility; to remove from its records any reference to the unlawful layoffs, discharges, employee evaluations, and attendance policy; and to post copies of an appropriate remedial notice. (SA 1, 6-7, 16-17).

SUMMARY OF ARGUMENT

The Company does not contest the Board's findings that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating its employees about their union activities, coercively interrogating its employees about their union activities; engaging in surveillance of its employees' union activities and giving employees the impression that their union activities were

[10] Chairman Hurtgen found it unnecessary to pass on whether the evaluation procedure was unlawful because it affected union supporters disproportionately. (SA 5 n. 16.)

under surveillance; threatening its employees with plant closure, discharge, physical violence, and unspecified reprisals because of their union activities; telling an employee that he should find another job if he wanted to engage in union activities; telling an employee that he must obtain company permission to engage in union activities; soliciting employees to sign an antiunion petition and unlawfully circulating and assisting in obtaining signatures on an antiunion petition; and by maintaining an overly broad solicitation policy prohibiting any solicitations on company property without prior company approval. Accordingly, the Board is entitled to summary affirmance of those findings.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(1)) by laying off or discharging 33 employees because of union activities, by hiring 10 new permanent employees in order to discharge or lay off union supporters, and by granting wage increases to other employees in order to discourage union activities.

The record firmly establishes that these actions were motivated by antiunion hostility. The Company was aware of its employees' union organizing campaign and responded with its own campaign of undisputedly unlawful interrogations, threats, surveillance, and other coercive statements and conduct. The timing of the layoffs and discharges, shortly after the Company learned of the union activity, is also strong evidence of antiunion motivation. The Company's

proffered reason for the discharges and layoffs--lack of work due to a buildup of inventory--is unsupported by the record and, in any event, is insufficient to demonstrate that the layoffs and discharges would have been imposed absent union activity.

The Company's hiring of 10 temporary employees as its own permanent employees also violated the Act. It enabled the Company to use those individuals as replacements for its own unlawfully laid off and discharged employees and was part of the Company's unlawful scheme to replace employees who supported the Union. The Company's subsequent granting of wage increases to certain employees further violated the Act. The Company was aware that its employees' desire for higher wages was the primary reason for their organizing activities and granted the increases shortly after the unlawful layoffs and discharges.

Substantial evidence supports the Board's finding that the Company further violated Section 8(a)(3) and (1) of the Act by conducting new employee evaluations, applying a new absenteeism policy, and using the evaluations to target union supporters for layoff of discharge. The evaluations were conducted prematurely with revised standards in response to the union organizing efforts and were used to target union supporters for layoff or discharge.

The Board acted within its broad remedial discretion in determining the make-whole remedy for the unlawfully terminated temporary employees. Its remedy is supported by principles established by the Board and the courts.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY ENGAGING IN UNLAWFUL INTERROGATIONS, SURVEILLANCE, THREATS, AND OTHER COERCIVE STATEMENTS AND ACTIONS IN RESPONSE TO ITS EMPLOYEES' UNION ACTIVITIES

As shown above, the Board found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1))[11] by coercively interrogating its employees about their union activities, engaging in surveillance of its employees' union activities and giving employees the impression that their union activities were under surveillance; threatening its employees with plant closure, discharge, physical violence, and unspecified reprisals because of their union activities; telling an employee that he should find another job if he wanted to engage in union activities; telling an employee that he must obtain company permission to

[11] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Section 7 of the Act (29 U.S.C. § 157) grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection. . . ."

engage in union activities, soliciting employees to sign an antiunion petition and unlawfully circulating and assisting in obtaining signatures on an antiunion petition; and by maintaining an overly broad solicitation policy prohibiting any solicitations on Company property without prior company approval. (SA 2, 11-13, 15-16.)

The Company does not contest those findings. (Br 20.) Accordingly, the Board is entitled to summary affirmance of the findings and summary enforcement of the portions of the Board's order based on the findings. *See NLRB v. Alwin Mfg*., 78 F.3d 1159, 1162 (7th Cir. 1996); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-1315 (7th Cir. 1995) (*en banc*), *cert. denied*, 503 U.S. 936 (1992). Moreover, those uncontested violations do not disappear simply because they have not been contested by the Company. Rather, they remain in the case, '"lending their aroma to the context in which the contested issues are considered.'" *Rock-Tenn. Co. v. NLRB*, 69 F.3d 803, 808 (7th Cir. 1995) (quoting *NLRB v. Shelby Mem. Hosp. Assn*., 1 F.3d 550, 567 (7th Cir. 1993). *Accord Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 667-668 (7th Cir. 1998).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY LAYING OFF AND DISCHARGING 33 EMPLOYEES BECAUSE OF ITS EMPLOYEES' UNION ACTIVITIES; BY HIRING 10 SNELLING EMPLOYEES ON A PERMANENT BASIS IN ORDER TO DISCHARGE OR LAY OFF UNION SUPPORTERS; BY GRANTING WAGE INCREASES IN ORDER TO DISCOURAGE UNION ACTIVITIES; AND BY CONDUCTING NEW EMPLOYEE EVALUATIONS AND USING THE EVALUATIONS TO TARGET UNION SUPPORTERS FOR LAYOFF AND DISCHARGE

A. The Layoffs and Discharges

1. Applicable principles and standard of review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits an employer from "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." An employer therefore violates Section 8(a)(3) and (1) of the Act by discharging, laying off, or taking other adverse actions against employees because of their union activity. *See NLRB v. Joy Recovery Technology Corp*., 134 F.3d 1307, 1314 (7th Cir. 1998);

The critical inquiry in such cases is whether the employer's actions were motivated by antiunion animus. *See Van Vlerah Mechanical, Inc. v. NLRB*, 130 F.3d 1258, 1263 (7th Cir. 1997); *NLRB v. Berger Transfer & Storage Co*., 678 F.2d 679, 691 (7th Cir. 1982). Once it is shown that opposition to union activity was a motivating factor in the employer's decision to take adverse action against an employee, the employer will be found to have violated the Act, unless the

employer demonstrates, as an affirmative defense, that it would have taken the same action even absent the employee's union activities. *See NLRB v. Joy Recovery Technology Corp*., 134 F.3d at 1314 (citing *NLRB v. Transportation Management Corp*., 462 U.S. 393, 401-403 (1983). *Accord Jet Star, Inc. v. NLRB*, 209 F.3d 671, 675 (7th Cir. 2000). In addition, if the Board finds the reason advanced by the employer did not exist or that the employer did not in fact rely upon it, the inquiry ends; there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the employee's union activity. *See Jet Star Inc*., 209 F.3d at 678.

The requisite unlawful motivation is established not only when the employer retaliates against individual employees for their union activities, but also when the employer lays off a group of employees, regardless of their individual union sympathies, to discourage the employees as a group for exercising their statutory rights. The issue in such cases is the "employer's motive in ordering the extensive lay-offs rather than . . . the anti-union or pro-union status of particular employees." *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985). *Accord NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1355 (7th Cir. 1984).

As the Fifth Circuit has explained, "[w]here the central aim of a mass lay-off is to discourage union activity, the discharge is unlawful, even though neutral or

anti-union employees suffer in the process." *Merchants Truck Line, Inc. v. NLRB*, 577 F.2d 1011, 1016 (5th Cir. 1978). *See Majestic Molded Products, Inc. v. NLRB*, 330 F.2d 603, 606 (2nd Cir. 1964) ("[a] power display in the form of a mass layoff . . . to 'discourage membership in any labor organization' satisfies the elements" of Section 8(a)(3) "even if some white sheep suffer along with the black"). The reverse is also true. *See NLRB v. Rain-Ware, Inc*., 732 F.2d at 1355 ("It is irrelevant that some union sympathizers were *not* laid off when the layoffs were meant to chill union activity") (citation omitted) (emphasis supplied). "The rationale underlying this theory is that the general retaliation by an employer against the workforce can discourage the exercise of [S]ection 7 rights just as effectively as adverse action taken against only known union supporters." *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d at 1180. *Accord Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 815 (3d Cir. 1986); *NLRB v. Rain-Ware, Inc*., 732 F.2d at, 1354-1355.

Because an employer rarely admits unlawful motivation, it is settled that it can be inferred from circumstantial as well as direct evidence. *See NLRB v. Shelby Memorial Hosp. Assn*., 1 F.3d 550, 568 (7th Cir. 1993); *Electronic Data Systems Corp. v. NLRB*, 985 F.2d 801, 804-805 (7th Cir. 1993). Such evidence includes employer knowledge of and animus toward union activities, as revealed

through the commission of other unfair labor practices;[12] the proximity in time between the union activity and the adverse actions;[13] the failure of the employer's asserted justifications to withstand scrutiny;[14] and the employer's disparate treatment of the affected employees.[15]

The Board's findings of fact are "conclusive" if supported by substantial evidence. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). *Accord Jet Star, Inc. v. NLRB*, 209 F.3d 671, 675 (7th Cir. 2000). Under that "sharply limited" standard, the reviewing court may not "dabble in fact-finding and . . . may not dispute reasonable

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[12] *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1125 (7th Cir. 1988); *NLRB v. Shelby Memorial Hosp. Ass'n*, 1 F.3d 550, 568 (7th Cir. 1993); *NLRB v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1137 (7th Cir. 1983); *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 600 (7th Cir. 1982) (contemporaneous threats and interrogation "highly relevant" to finding of animus), *modified on other grounds*, 462 U.S. 883 (1984).

[13] *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1314-1315 (7th Cir. 1998); *Jet Star Inc. v. NLRB*, 209 F.3d 671, 676 (7th Cir. 2000); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692, 697 (7th Cir. 1991).

[14] *Jet Star Inc. v. NLRB*, 209 F.3d at 678; *Union Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 490-91 (7th Cir. 1993). *See also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966) (employer's proffer of false explanation permits the Board to infer that the real motive "is one that the employer desires to conceal--an unlawful motive--at least where . . . the surrounding facts tend to reinforce that inference").

[15] *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 401-09 (7th Cir. 1992); *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d at 1124-25; *NLRB v. Bliss & Laughlin Steel Co.*, 754 F.2d 229, 236 (7th Cir. 1985).

determinations simply because [it] would have come to a different conclusion had [it] reviewed the case *de novo*." *Livingston Pipe & Tube, Inc. v. NLRB*, 987 F.2d 422, 426 (7th Cir. 1993) (citations omitted). *Accord Universal Camera Corp. v. NLRB*, 340 U.S. at 488; *NLRB v. Advance Transportation Co*., 965 F.2d 186, 190 (7th Cir. 1992). The reviewing court owes considerable deference to the Board's inferences and conclusions drawn from the proven facts. *See U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1313-1314 (7th Cir. 1991) (*en banc*). *See also Jet Star, Inc. v. NLRB*, 209 F.3d 671, 677 (7th Cir. 2000).

2. The instant case

a. A motive for the discharges and layoffs was union activity

Here, the Board found (SA 2-3, 12-14) that the Company's decision to reduce its workforce and the resulting layoffs and discharges of 33 employees were motivated by the union organizing activities of its employees. As we show below, that finding is supported by substantial evidence.

The record is replete with evidence of the Company's knowledge of its employees' organizing activities and its hostility toward them. As shown above (_____), President Prock learned of the organizing campaign on or before February 13 and quickly met with his supervisors. He then mounted a workbench where he waved a union authorization card over his head and told the assembled

employees that the Company was aware of and opposed, their organizing activity, and suggested that the employees get their cards back and tear them up.

Further, other company officials and supervisors were aware of the organizing effort and of the identities of many of the employees who supported it. As shown (_____), Supervisor Winking knew the identity of several prounion employees and discussed certain union supporters with Supervisors Gibbs, Mock, and Trimpe. Winking also reported the identities of his department's union supporters to Production Coordinator Smith, who was also widely aware of employees' views for or against the Union because he was on the plant floor all day and heard their comments.

The Company's knowledge and antiunion hostility is further illustrated by the numerous and undisputedly unlawful acts of company officials and supervisors, including coercive interrogations, threats of discharge, plant closure, physical violence, and other reprisals; surveillance; impressions of surveillance; and circulation and solicitation of employee signatures on an antiunion petition. As the administrative law judge accurately observed (SA 15), "the [Company's] antiunion animus was strong clear, and unambiguous." The timing of the layoffs and discharges are strikingly persuasive evidence that they were motivated by union activities. As shown above (_____), the Company quickly decided to effect the layoffs and discharges on February 20, only 7 days after learning of

the employees' organizing effort and, the same day that the Union's representatives distributed literature at the Company. In light of this evidence, the Board was warranted in finding (SA 3) that the General Counsel had carried his burden of showing that the employees' union activity was a motivating factor in the Company's decision to impose the layoffs and discharges.

3. The evidence does not support the Company's contention that it would have discharged and laid off employees even absent union activity

The Board was also warranted in finding (SA 2) that the Company failed to carry its burden of showing that it would have laid off and discharged the employees in the absence of union activity. Specifically, the Company contends (Br 5-8, 15-16, 17-18, 20-22, 26-27) that it imposed the layoffs and discharges on the lawful ground that it had a buildup of production inventory, without corresponding customer orders and payments. As a result, according to the Company, it had "up to 25% more production workers than required." As we show below, that contention was reasonably rejected by the Board (SA 14, 15) as inconsistent with the record evidence.

As the administrative law judge observed (SA 14), the "logical" starting point for examining the Company's actions is the announcement by President Prock to the assembled employees in mid-January. Prock told the employees in January that there were new orders, the 1997 outlook was good, and there was not

much to worry about. Moreover, between that point in mid-January and February 20, when the layoff decision was made, there were no significant changes in the Company's economic outlook. Indeed, President Prock's testimony contradicts the Company's argument (Br _) that meetings with its customers on February 18 and 19 caused a heightened concern over excessive production that, in turn, led to the layoffs. As the administrative law judge observed (SA 14) Prock's testimony was, unequivocally, to the contrary. Thus, Prock testified (_____) that even after those meetings, the Company

> [H]ad the core business of Phillips, Borders, K-Mart and Dominos to sustain the number of workers there plus going out and getting some business. I thought it looked--I know it looked a lot better and I made this comment--than it did a year earlier.
>
> So the difference between the first part of January and the end of February was not that significant but yet it was enough that we had to make some changes.

In short, Prock's testimony effectively forecloses the Company from contending that information it gleaned at meetings with customers required the decision to layoff a large number of its employees. As Prock noted, the meetings between Company officials and customers on February 18 and 19 led to the conclusion that the business of those customers could "sustain the number of workers" the Company had.

Further, Prock's testimony--as opposed to the Company's contention--was consistent with surrounding evidence. As the administrative law judge observed

(SA 14), the Company decided to reduce its workforce despite anticipating significant increases in its customers' orders. Thus, the Company's customers in 1996 included Borders, K-Mart, Domino's, and Phillips 66. During 1996, the Company sold Borders $4 million worth of fixtures. (SA 14; Tr 496, 978-979, GCX 71.) As of January 1997, the Company expected that Borders would order about $5.5 million worth of fixtures between January and October 31. (SA 14; Tr 1006.) Between February 1, 1996 and January 31, 1997, the Company sold K-Mart almost $2.5 million worth of fixtures. (SA 14; Tr 1077-1078, GCX 70.) As of January 1997, the Company expected that K-Mart would order about $3.4 million worth of fixtures in 1997. (SA 14; Tr 1008.) During 1996, the Company sold Domino's $1,740 million worth of fixtures. (SA 14; GCX 54.) As of February 20, 1997, the Company projected that it would sell Domino's $500,000 worth of fixtures by October 31. (SA 14; GCX 27, Tr 741.) In 1996, the Company sold Phillips 66 almost $300,000 worth of fixtures and other products. (SA 14; GCX 68, p. 3.) As of January 1997, the Company anticipated that it would sell Phillips 66 750,000 worth of products by October 31. After meeting with Phillips 66 officials, the Company revised downward its anticipated sales to Phillips 66 to $480,000. As the administrative found (SA ___), that was the only reduction in business that the Company anticipated. (SA 14; Tr 1329-1330.) On the other hand, in January 1997, the Company had also obtained a new customer,

Highsmith, and expected orders from Highsmith in the amount of $500,000 during 1997. (SA 14; Tr 1213, GCX 31.)

Of course, those expectations of significant increases in customer orders hardly support the Company's contention that a reduction in the workforce was necessary. Moreover, the Company gains little by contending (Br ___) that its $2.1 million inventory outweighed the anticipated increases in customer orders. President Prock was certainly aware of the inventories but testified, nonetheless, that in February, the Company's economic health could sustain its employee complement.

In addition, the administrative law judge was warranted in noting (SA 11) the incongruity of the Company implementing the large layoff in March, only to turn around in June to hire new employees, and impose overtime to increase production. In light of all the circumstances, that incongruity is not resolved by the Company's assertion (Br 22, 27) that between the March layoffs and June, it was able to "produce at anticipated levels with no overtime or extra shifts, no new hiring[,] and with 17-18% of attrition in the existing workforce." Clearly, the Company's June staffing crisis--requiring overtime, additional shifts, and 25 to 30 new hires--was the obvious result of reduced production levels caused by the March layoffs and discharges. Moreover, that reduced production ran counter to the Company's stated policy of planning in advance for the Company's summer

shipping months. As Supervisor Jeff Gibbs testified, July and August are the Company's busiest months because the customers' stores are completed and ready for their fixtures. (Tr 1169, 1187.) Accordingly, Prock had told the employees during the January meeting that the Company planned to build inventory during the slow months to avoid the need for overtime during the busy summer months. (SA 13; Tr 301, 1002.)[16] Thus, the administrative law judge was reasonable in concluding that the Company's production crisis in June tended to show that the March layoffs and discharges were not occasioned by economic reasons, but were, instead, contrary to the Company's own understanding of its projected needs.

Finally, the production figures cited by the Company in defense of the layoffs and discharges are unpersuasive. In support of its contention that its workforce was overstaffed by 25 percent, the Company asserts (Br 7, 21-22, 24) that its stock inventory resulted in a situation in which its staffing level produced about $45,000 in product per day, while "only $35,000 per day was anticipated to be required through October 31." The Company arrives at those figures (Br 8) by claiming that without a reduction in its staffing level, it would have produced

[16] The Company was aware, for example, that the bulk of orders for Borders, would need to be shipped during the summer. (GCX 30, RX 8.)

$6,795,000 in products by the end of October, while only $5,480,000 worth of new products was needed.[17]

The Company's figures are questionable at best. Its $5,480,000 figure fails to include the $500,000 worth of products expected to be ordered from its new customer, highsmith. (Tr 1213.) That inclusion brings the figure up to $5,980,000. On the other hand, the Company's contention that, without the workforce reduction, it would have produced $6,750,000 in product by October 31, at a rate of $45,000 per-day, is without merit. The Company arrives at those inflated figures by limiting its calculations to the limited period between January 1, and February 20, 1997. The record shows that production in January was abnormally high. The $215,885 figure for January 8, 1997 was the highest daily production figure since the Company began operating in November 1995. (GCX 25.) And January 10 and 13 saw daily production of $114,358 and $122, 867, respectively. (*Id*.)

A representative sample of the Company's production rates should include November and December 1996, in which the average daily production rates were $27,913 and $30,939, respectively, with a comparable number of employees,

[17] The $45,000 per day figure was arrived at using the average daily production figure during the period January 1 to February 20, 1997. The $6,795,000 figure is $45,000 multiplied by the 151 working days from February 20 to October 30. (Tr 799-809, 1009-1010, GCX 27.)

working 8-hour days. (*Id.*)[18] Had the Company used an average of its production from November 1996 through February 1997, it would have had an average daily production of $39,180 and a 151 workday total of $5,916,180. This realistic figure is much closer to the Company's contention that it needed production that generated only $5,480,000 in products. And when the $500,000 worth of Highsmith's business is added (P. ___ above) the difference between the $5,916,180 production projection and the $5,980,000 production needs is virtually nonexistent.

In short, the Company's "overstaffing" defense is unsupported by convincing evidence and falls far short of demonstrating that the Company would have imposed the discharges and layoffs absent union activity.[19]

B. The Hiring of 10 New Permanent Employees

The Board was also warranted in finding (SA 5) that the Company's March 10 hiring of 10 Snellings employees as its own employees violated the Act. As

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[18] The Company had about 170 employees in November and December and about 165 in January and February. (RX 25.)

[19] The Company's reliance (Br 26-27) on *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1487 (6th Cir. 1993), is misplaced. There, the Court noted that the Board's conclusion that the employer imposed layoffs in response to union activity would have require a finding that the employer "walked away from" $10 to 18 million in business because of union activity. No circumstances are present here to support that the Board's findings are dubious because they ignore countervailing business reality.

the Board noted and as shown above (_____), the hiring of those employees took place despite the Company's plan to reduce its workforce by 20 percent and amidst mass discharges and layoffs. At the time it hired the Snellings employees on March 10, the Company had already unlawfully discharged 11 of its own employees on March 4 and laid off 10 more on March 7. Then, on March 11, the day after hiring the Snelling employees, the Company unlawfully laid off 12 more of its own employees, 10 of whom had signed union authorization cards and 4 of whom were members of the union organizing committee. Thus, the Company was able to rid itself of many of its union supporters while avoiding a significant workforce reduction by replacing them with Snellings employees. As the Board reasonably (SA 5), the Company's hiring of the Snelling employees would not have occurred in the absence of its decision to lay off numbers of its own employees and was "part of the . . . unlawful scheme to discharge and lay off employees who engaged in union activities."

The Company's contention (Br 12, 24-25) that it simply sought to replace its own "inferior workers" with better performing Snellings employees is without merit. As Vice President Hamann testified, the Company sought, and hired directly, people with skills in the trade, while some of the Snellings referrals were unqualified and the Company "tried to train them." (Tr 491.) Moreover, the Snellings employees hired as Company employees on March 10 did not even

represent the best performing Snellings referrals. As the Board observed, the Company, in December 1996, had hired 10 Snellings employees, selecting the best qualified of the Snellings employees who had worked at the Company 's facility for the requisite 300 hours. (SA 5 n.18; Tr 712-713, 870-871.) The Company then received additional temporary employees from Snellings in January and February 1997. (SA 5 n.18; GCX 61.) Thus, in March, the only Snellings employees available were ones who had been passed over for hire in December 1996 or had been working at the Company's facility for only a short time. Finally, the Company's assertion that the 10 hired Snellings employees had "scored well" on the Company's late February evaluations is unavailing. As discussed below (pp. __), those evaluations were unlawfully adopted and unlawfully used to target union supporters for discharge or layoff.

C. The New Evaluations Used to Facilitate the Discharges and Layoffs

The Board was also warranted in finding (SA 4-5) that the Company committed two additional violations of Section 8(a)(3) and (1) of the Act. First, conducting employee evaluations with revised standards, as part of an unlawful discharge plan makes those evaluations, without more, unlawful. Second, it is unlawful to use evaluations to target union supporters for discharge or layoff.

An employer violates Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by implementing new standards for evaluating or screening employees for the

purpose of discriminating against union supporters. *See, for example, Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1332-1333, 1334, 1335 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978) (new "written warning" system for disciplining employees unlawfully implemented because of union activity) *Accord Performance Friction Corp. v. NLRB*, 117 F. 3d 763, 766-767 (4th Cir. 1997); *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 267-268 (D.C. Cir. 1993). *See also Pace Industries*, 320 NLRB 661, 662 (1996), *enforced* 118 F.3d 585, 587-589 (8th Cir. 1997) (employer unlawfully adopted employee screening standards in order to avoid union representation)

In determining whether the evidence supports an inference that such changes were instituted in response to union activity, the Board looks to whether the employer knew of the union organizing activity; whether the employer made the changes to the system in the midst of that union organizing activity; whether--and the extent to which--the employer's other conduct reveals that it resorted to unlawful measures to discourage that organizing activity; and whether the employer used the revisions in the system to discharge union activists. *See Joe's Plastics, Inc*., 287 NLRB 210, 211 (1987); *Robinson Furniture, Inc*., 286 NLRB 1076, 1076-1077 (1987); *International Business Systems, Inc*., 247 NLRB 678, 681-682 (1980), *enforced mem*., 659 F.2d 1068 (3d Cir. 1981); *Electric-Flex Company*, 228 NLRB 847, 848 (1977), *enforced*, 570 F.2d 1327 (7th Cir.).

Here, the record supports the Board's finding (SA 4) that the prematurely imposed and revised employee evaluations conducted by the Company in late February and early March "were undertaken expressly to carry out the [Company's] unlawful decision to lay off and discharge employees and would not have been undertaken but for [that] decision." As the Board noted (SA 4) and as shown above (_____), the Company performed new evaluations only 4 months after the previous evaluations in November 1996. That was clearly inconsistent with what employees were told in November, namely, that they would not be evaluated again for 6 months. Also, the February evaluations introduced a more stringent scoring system on attendance. In the circumstances, it is clear that the new February evaluations with the more stringent attendance requirements were instituted solely to facilitate the unlawful discharges and layoffs. As such, the evaluations were, themselves, motivated by unlawful reasons.

Moreover, as the Board found (SA 4-5), the February evaluations were used to discriminate against employees because of their union activities. *See Federal Screw Works*, 310 NLRB 1131, 1145-1143 (1993).

As the Board observed (SA 3) and as shown above (_____), the Company, by its unlawful circulation of the antiunion petition and other knowledge gained by its supervisors, knew which employees supported the Union and which did not. Moreover, the subjective criteria within the evaluations, such

as "attitude," made it possible to score employees in a manner that would eliminate union supporters. Indeed, the results of the evaluations show that a strongly disproportionate number of union supporters were discharged or laid off as a result of the evaluations. As the Board noted (SA 4-5) and as shown above (_____), 21 of the 79 employees who had *not* signed one the Company's antiunion petitions (27 percent) were discharged or laid off, while only 5 of the 81 employees who had signed an antiunion petition (6 percent) were. Moreover, 5 of the 11 employees discharged on March 4 had signed authorization cards, while 10 of the 12 employees laid off on March 11 had signed cards, and 4 of them were members of the seven-person union organizing committee. As this Court has long recognized, " . . . disproportionate treatment of union and nonunion workers [in discharge and layoff cases] may be very persuasive evidence of discrimination." *NLRB v. Chicago Steel Foundry*, 142 F.2d 306, 308 (1944). *Accord NLRB v. Bedford-Nugent Corp*., 379 F.2d 528, 529 (7th Cir. 1967); *American Wire Products, Inc*., 313 NLRB 989, 994 (1994); *The Holding Company*, 231 NLRB 383, 390 (1977). Here, the Company has asserted no credible basis for the disproportionate number of union supporters it removed from its workforce through the use of the evaluations.[20] Accordingly, the use of the evaluations as an

[20] The Company suggests (Br 24) that its evaluation system was valid because it was "similar to" the one prepared for the employer by Arthur Anderson & Company in *NLRB v. Louis A. Weiss Memorial Hosp*., 172 F.3d 432, 438, 440 (7th

integral part of the Company's discriminatory terminations, and the results it achieved, support the Board's finding that the evaluations were used for the particular purpose of discriminating against union supporters, in violation of Section 8(a)(3) and (1) of the Act.

D. The Wage Increases

The Board was also warranted in finding (SA 6) that the Company acted unlawfully in granting wage increases to about 30 employees on March 17. As the Board noted and as shown above, employee dissatisfaction with wages was a principle issue in the Union's organizing effort, and President Prock knew it. On the same day Prock met with employees to show his awareness of the organizing effort and strong opposition to it, his supervisors told him that the organization effort was based on resentment over low wages. The timing of the increases also underscores their unlawfulness. As the Board noted (SA 6), the increases "followed closely on the heels of the Company's unlawful layoffs and discharges of March 4, 7, and 11."

The Company's contention (Br 16) that the increases were "routine, regularly- scheduled adjustments based on the employees' length of service and the established company pay scales" is without merit and was properly rejected by

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Cir. 1999). That suggestion is beside the point. For it is not the system itself that is discriminatory. It is its implementation in response to the organizing campaign and its use to weed out union supporters.

the Board (SA 6). Indeed, that contention is refuted by the testimony of the Company's own witness, Vice President Soebbing. When asked why the wage increases were given right after the layoffs, Soebbing stated that Vice President Ronald Hamann and Production Coordinator Kent Smith had told him that the Company had a number of employees who had been there for a long time and were making $7.00 or $7.50 per hour, that Hamann and Smith wanted to move them up to a minimum of $ 8.00 per hour, and "that's what we did there." (SA 6; Tr 783.) Moreover, the last round of wage increases "of that size" had been given only 4 months earlier, following employee evaluations conducted in November 1996 (*Id*.) Thus, as the Board observed, the March 17 increases were not routine or regularly scheduled, but "given on an *ad hoc* basis" and "had not been planned before the [Company] became aware of its employees' union activity and the role that the employees' dissatisfaction with low wages played in that activity." (SA 6.) Accordingly, the circumstances surrounding the March increase and the failure of the Company's proffered reasons to withstand scrutiny support the Board's conclusion (*id*.) that the March 17 increases were motivated by the desire to discourage union activities and would not have been made in the absence of such activities.

III. THE COMPANY'S CHALLENGE TO THE BOARD'S REMEDIAL ORDER IS WITHOUT MERIT

The Company contends (Br 27-28) that the Board's remedial order erroneously provided "make whole" relief to the Snellings employees laid off on March 7. That contention is without merit.1

The Board's remedial authority under Section 10(c) of the Act (29 U.S.C. § 160(c)) includes requiring offending parties "to take such affirmative action[,] including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]." So long as the Board's order is in furtherance of those policies, "the Board has wide discretion in requiring an employer to take whatever affirmative action it deems necessary to cure an unfair labor practice." *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1534 (7th Cir. 1989). Thus, a Board remedial order warrants enforcement, "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord NLRB v. Manitowoc Eng'g Co*., 909 F.2d 963, 972-973 (7th Cir. 1990). Here, the Board's remedial order is consistent with established precedent and within its wide discretion.

As unlawfully terminated individuals, the Snellings employees are entitled to a make-whole remedy that will place them in the position they would have been in, but for their unlawful terminations. The Board's remedial order with respect to the

unlawfully laid-off Snellings employees requires the Company to notify Snellings that it has no objection to those individuals being employed at the Company's facility. (SA 6.) That remedy is in accord with the Board's settled policy that an employer who unlawfully discharges temporary employees be required to notify the labor contractor that employs them that it has no objection their employment at its workplace. *Vemco, Inc*., 314 NLRB 1235, 1242 (1994).[21] Contrary to the Company's contention (Br 27), the order does not require that the Company directly reinstate the Snellings employees.

The Company contends (Br 27-28) that the record was insufficient to support a make-whole remedy for the Snellings employees. As the Board noted (SA 6), however, such matters are properly determined in Board compliance proceedings. *See Santa Belarus, Inc. v. NLRB*, 568 F.2d 545, 549 (7th Cir. 1978). *Accord NLRB v. Dazzo Products, Inc*., 358 F.3d 136, 138 (2d Cir. 1966), and cases cited.

[21] The Company points out (Br 28) that *Vemco* was denied enforcement in *Vemco, Inc. v. NLRB*, 79 F.3d 526, 528-531 (6th Cir. 1996). The denial of enforcement was based, however, on the court's finding that the employer did not commit any of the underlying unfair labor practices found by the Board. The merits of the remedial order, itself, were not passed on by the court..

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter denying the petition for review and enforcing the Board's order in full.

_____
WILLIAM M. BERNSTEIN
Senior Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2997

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

FREDERICK C. HAVARD
Supervisory Attorney

National Labor Relations Board

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g:huck stores brf.wmb